No. 14,744

United States
COURT OF APPEALS
for the Ninth Circuit

DONALD M. WOLLAM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court for the District of Oregon.

BRIEF FOR THE APPELLEE

C. E. LUCKEY
United States Attorney
District of Oregon

PAUL P. O'BRIEN,

ROBERT R. CARNEY
Assistant United States Attorney
Attorneys for Appellee

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 11-7-56—45

INDEX

INDEX (Cont.)

CITATIONS

Cases

CITATIONS (Cont.)

STATUTES

No. 14,744

United States
COURT OF APPEALS
for the Ninth Circuit

DONALD M. WOLLAM,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Judgment of the United States District Court for the District of Oregon.

BRIEF FOR THE APPELLEE

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Appellee adopts the jurisdictional references of appellant's brief.

QUESTIONS PRESENTED

1. May the appellant supplement the record by evidence not before the trial court?

2. May the Court of Appeals take judicial notice of evidentiary documents not of record nor directed to the trial court's attention?

3. Did the Court below properly deny appellant's motion to dismiss the indictment on appellant's claim that the indictment failed to allege facts showing pertinency of questions asked appellant?

4. Did the Court below properly deny appellant's motions for judgment of acquittal and new trial on the contention that the evidence failed to establish beyond a reasonable doubt that the questions asked appellant were pertinent?

5. Did the Court below properly deny appellant's motion to dismiss the indictment on the contention that the indictment failed to allege facts showing that appellant's refusal to answer the question was wilful?

6. Did the Court below properly deny appellant's motions for judgment of acquittal and new trial on the contention that the evidence failed to show beyond a reasonable doubt that the appellant's refusal to answer the questions was wilful?

7. Did the Court below properly hold that the appellant was not entitled to invoke privilege against self-incrimination in refusing to answer the questions?

8. Did the Court properly hold that the appellant had been sufficiently directed to answer the first four questions after claim of privilege against self-incrimination?

STATUTE INVOLVED

2 USC 192. Appellee adopts statute as printed in page 2 of Appellant's Brief.

COUNTER STATEMENT OF THE CASE

1. Appellant Has Asserted Evidence Not in the Record.

In the statement of the case and throughout his argument appellant has relied upon evidence dehors the record. Appellant has constantly referred to portions of the testimony of other witnesses before the Committee. Not any of the testimony of these witnesses before the Committee was presented to the trial court.

In addition, appellant has further relied upon material outside the record by referring to newspaper articles which were merely submitted to the court as part of an offer of proof, which offer was denied. The denial of the offer of proof has not been assigned as error (R. 87).

2. Appellee's Counter Statement of Case.

Appellant was convicted by jury trial of refusing to answer questions pertinent to questions under inquiry by a Subcommittee of the Un-American Activities Committee of the House of Representatives, United States Congress, on all counts of a five-count indictment.

Appellant, *inter alia,* at the trial below, asserted through counsel that his refusals had been privileged and the questions not pertinent to the subject under inquiry. Appellant further challenged the sufficiency of the indictment, and after verdict moved for new trial,

alleging insufficiency of the indictment and evidence. The Court sustained the indictment and denied the motion for new trial, and held the questions pertinent and the refusals of the defendant to answer not privileged. The jury was instructed that they must find, in order to convict, that the defendant wilfully refused to answer the questions.

Appellant, during his testimony before the Subcommittee, was directed to answer each of said questions.

The questions which the appellant refused to answer were the preliminary identifying questions immediately following his oath, and inquired of his present address, present employment, and educational background. On their face, they were innocuous questions. At the trial below, at the time of arraignment, appellant through his counsel (R. 18) indicated a desire to purge himself of the contempt citation, was allowed time to support such position, but did not attempt a showing thereon.

A motion to dismiss, raising many of the points relied upon by appellant in this appeal, was denied. A motion for the issuance of a *subpoena duces tecum* and for inspection of documents in possession of the Subcommittee's investigator was filed by appellant (R. 8-9) and denied by the court for the reason, *inter alia,* that the documents sought were not evidentiary or relevant to any issue in the case. *U. S. v. Carter,* DC DC 1954, 15 FRD 367; *Bowman Dairy Co. v. U. S.,* 341 U.S. 214, 1951; *Morford v. U. S.,* DC Cir. 1949, 176 F. 2d 54. The denial of the motion for *subpoena duces tecum* has not been specified as error on this appeal.

SUMMARY OF ARGUMENT

The appellant cannot supplement the record with evidence which had not been presented to the trial court. *Maffie v. U. S.,* 1 Cir. 1954, 209 F. 2d 225. An appellate court will not take judicial notice of evidentiary matters not called to the attention of the trial court in a criminal case. *Rumely v. U. S.,* DC Cir. 1952, 197 F. 2d 166, aff. 345 U.S. 41.

The indictment was sufficient. The allegation of pertinence was sufficient. *Sinclair v. U. S.,* 279 U.S. 263, 1929. The proof was sufficient to establish pertinency. The questions were identifying and concerned subject matter properly under inquiry (R. 50-60). The indictment alleged that the appellant refused to answer those pertinent questions. The word "refused" embodies intent amounting to deliberate, not inadvertent, failure. Preceding the word "refused" with the word "wilfully" would contribute nothing toward a complete statement of the charge, nor more fully advise the appellant of what he must defend. See *Chapman v. U. S.,* 8 App. DC, 302 at 316, 319, 1895; *Sinclair v. U. S., supra,* at 299; *Fields v. U. S.,* DC Cir. 1947, 164 F. 2d 97, cert. den. 332 U.S. 851, 1948; *In re Chapman,* 166 U.S. 661, 1897; *U. S. v. Deutch,* DC Cir. 1956, 235 F. 2d 853; *Elwert v. U. S.,* 9 Cir. 1956, 231 F. 2d 928.

The proof supports the jury verdict that the appellant acted wilfully, deliberately and intentionally and not inadvertently. See R. 53 and Govt's Ex. 4, p. 4, wherein the appellant said:

> ". . . since I have no intention of becoming a member of your stable of stool pigeons I am going

to stand upon my constitutional rights and decline to answer the question upon the grounds . . ."

If he was not privileged, as the Court found, he was obliged to answer the questions.

There was nothing in the setting as submitted to the trial court, to entitle the appellant to invoke the privilege against self-incrimination. The witness did not, through any admitted evidence of record, show the Court anything in the setting to support his claim of privilege.

Appellant was under clear directions to answer the questions. He could have had no doubt that the Committee was rejecting his claims of privilege, in every instance, as to the questions involved in the indictment.

ARGUMENT

I. Upon an Appeal in a Criminal Case, the Appellate Court Will Not Consider Additional Evidence Which Had Not Been Presented to the Trial Court.

Appellant's brief and the Appendix attached thereto include portions of the testimony before the Committee which were neither offered nor received in evidence at the trial and are not part of this record on appeal. In this manner appellant has attempted to supplement the record with respect to the "setting" at the time appellant appeared before the Committee. No attempt whatever was made by appellant to have any portion of the testimony of the other witnesses before the Committee placed in evidence at the time of trial.

A criminal case is not tried *de novo* upon appeal, but upon the record. The appellate court will not consider matters of evidence dehors the record but merely brought to the Court's attention in appellant's brief. *Maffie v. U. S.*, 1 Cir. 1954, 209 F. 2d 225.

In the *Maffie* case, *supra,* appellant desired to supplement and augment the record by having included additional evidence with respect to the "setting", in the form of newspaper stories. In declining to receive the newspaper articles, the court emphasized that it would certainly be a procedural innovation to require an appellant court, upon review of a judgment in a criminal case, to receive and consider additional evidence which had never been presented to the court rendering the judgment under review.

The evidence with which appellant desires to supplement the present record cannot, in any manner, be considered newly-discovered evidence. The testimony and proceedings before the Committee had been printed and published prior to the trial and were available to appellant as a matter of public record. *Brandon v. U. S.*, 9 Cir. 1951, 190 F. 2d 175; *Wagner v. U. S.*, 9 Cir. 1941, 118 F. 2d 801.

By means of supplementing the record, appellant also appears to be attempting to change somewhat the theory of defense, by urging matters which were neither offered nor claimed at the time of trial. If, at the time of trial, appellant, in claiming the privilege against self-incrimination, was actually relying upon the testimony of the other witnesses before the Committee to show the

"setting", it was incumbent upon appellant to bring such testimony before the trial court ruling upon the issue of privilege.

II. On Review of Judgment in a Criminal Case, the Appellate Court Will Not Take Judicial Notice of Evidentiary Matters Not Called to the Attention of the Trial Court.

In the footnote at Page 3 of appellant's brief, it is contended that the present record can be supplemented on the thory that this court may take judicial notice of the entire official records of a Congressional Committee, relying upon *Greeson v. Imperial Irrigation Dist.*, 9 Cir. 1932, 59 F. 2d 529; *Red Canyon Sheep Co. v. Ickes,* DC Cir. 1938, 98 F. 2d 308; *Fletcher v. Jones,* DC Cir. 1939, 105 F. 2d 58.

The cases relied upon by appellant do not support his position. Appeals were taken in each of these cases following the granting of motions to dismiss complaints seeking injunctions. The appellate court simply followed the well-established principle that upon a motion to dismiss, the court will deem as admitted, the allegations of the complaint and may further consider pertinent facts within its judicial knowledge. The cases were before the court on questions of law based entirely on the pleadings, as no record whatever was made in the trial court with respect to evidence. In at least two of the cases relied upon by appellant, the trial court had been requested and did take judicial notice of the same factual matters noticed by the appellate court.

When a party desires a trial court to take judicial knowledge of certain matters which are not so self-

evident as to be within the actual knowledge of the court, the party is required to bring such matters to the attention of the court. 9 Wigmore on Evidence, Sec. 2568. The trial court could hardly be expected to have personal knowledge of all the testimony and proceedings before the Committee. At no time did appellant present appropriate transcripts of this testimony to the court and request that judicial notice thereof be taken. Without such request for judicial notice, the appellant was not relieved of the duty of producing evidence as to these facts.

It is further submitted that the present case did not present a situation for the use of judicial notice. Accurately speaking, judicial notice is limited to the acceptance by the court of a fact as proven without requiring evidence from the party. 9 Wigmore on Evidence, Sec. 2566(4). The judicial notice theory is presently being loosely used by appellant to describe the rule of evidence which would allow appropriate copies of these Congressional proceedings to be admitted in evidence. 28 USC Sec. 1736.

In *Rumely v. U. S.*, DC Cir. 1952, 197 F. 2d 166, aff. 345 U.S. 41, the Court of Appeals, when reviewing a conviction for refusal to answer questions propounded to the appellant by the House Committee on lobbying activities, refused to consider portions of the testimony adduced before the Committee, which had not been offered or admitted in evidence at the trial. When the prosecutor wanted a portion of the hearings in evidence, specific parts of the transcript of the hearings were of-

fered in evidence and were received without apparent objection. On appeal, the government apparently sought to have the appellate court take judicial notice of other portions of the testimony before the Committee which had not been received in evidence. With respect to the contention that the appellate court could take judicial notice of these, the court emphasized:

> "Certainly, in a criminal case, we cannot take judicial notice of things the defendant is alleged to have said or done, not shown or offered to be shown in evidence; in fact, no request for such notice was made either in the trial court or before us."

In *Christoffell v. U. S.,* DC Cir. 1952, 200 F. 2d 734, portions of the proceedings before the Congressional Committee were included in the record, not by means of judicial notice but by appropriate documentary evidence. In fact, the trial court declined to admit a portion of the hearings before the Committee, as they were not material to the issue.

The appellant submitted the issue of privilege to the court below on the record as it stood at that time. Upon review of the judgment below, this court should not consider additional evidence neither presented nor called to the attention of the lower court.

III. The Indictment Properly Charged, and the Proof Established the Pertinency of the Questions Asked Appellant.

A. *The Indictment Properly Charged Pertinency of the Questions Asked Appellant.*

The appellee concedes that the questions must be pertinent, but submits that the indictment properly

pleads that they were. The same allegation appears in the case of *U. S. v. Lamont,* DC S.D. N.Y. 1955, 18 FRD 27, as to pertinency, and the Court therein, although finding the indictment defective on other grounds, in that case found no objection to such allegation of pertinency after exhaustive discussions of the requirements of pleading and proof of pertinency. The appellate court, affirming, found that the indictment references were to acts of Congress establishing a Committee to inquire into matters which involved no powers of inquiry enumerated which would make the questions charged in that indictment pertinent. *U. S. v. Lamont,* 2d Cir. 1956, 236 F. 2d 312.

The indictment considered as a whole, without more, would show pertinence of the questions. They were specifically alleged to be pertinent to the question then under inquiry. The position of appellant would seem to be that a committee of Congress, in taking testimony from a witness duly subpoenaed, would be obliged to plunge directly into questions on the subject-matter of inquiry without right to know from the witness anything of his identity, background, or qualifications for testimony about the information sought. Appellant's position further ignores the pertinency of Congress' knowing what the background of persons is who possess or do not possess information concerning the subject under inquiry, or who are willing or unwilling to provide the Congress with the benefit of their knowledge. The questions herein involved are so pertinent on their face that further description in the indictment would add nothing to advising the appellant of the facts against which he

must defend or preventing surprise. The allegations would not permit subsequent charge on the same facts. By reference to the enactments of the Congress cited in the indictment, the charges thereof and the questions themselves, the appellant could have no doubt that the questions were alleged to be pertinent, and by his serious contention that they were not pertinent, shows he was not misled. The elements of the offense were all pleaded. See *U. S. v. Josephson,* 2 Cir. 1948, 165 F. 2d 82, cert. den. 333 U.S. 838, 1948; *Sinclair v. U. S., supra,* at 298-299; *Elwert v. U. S., supra.* In such circumstances, utilizing the language of the statute as was here done seems appropriate. We submit that the questions herein were of such nature that their not being pertinent in any inquiry appears improbable.

B. *The Proof Supported the Court's Finding of Pertinency.*

The inability to inquire into the identity and background of a witness would in effect preclude inquiry of the witness at all. A witness declining to answer such questions frustrates the lawful objects of the Committee so that other more probative questions become meaningless, yet for his recalcitrance, the appellant would have the Committee powerless to act in support of its lawful powers. Questions as to address, employment and educational background are not unlawful intrusion into private affairs. *In re Chapman, supra; U. S. v. Josephson, supra; Lawson v. U. S.,* DC Cir. 1949, 176 F. 2d 49, cert. den. 339 U.S. 934, 1950; *Morford v. U. S.,* DC Cir. 1949, 176 F. 2d 54; *U. S. v. Orman,* 3 Cir. 1953, 207 F.

2d 148. As the Court said in *Barsky v. U. S.*, DC Cir. 1947, 167 F. 2d 241, cert. den. 334 U.S. 843, 1948, at p. 246:

> "If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. . . . Personnel is part of the subject. Moreover, the accuracy of the information obtained depends in large part upon the knowledge and the attitude of the witness, whether present before the Committee or represented by the testimony of another. . . ."

And, at p. 249:

> "We proceed upon the theory that even the most timid and sensitive cannot be unconstitutionally restrained in the freedom of his thought. But this consideration does not solve the problem, because the problem is the relative necessity of the public interest as against the private rights. Even assuming private rights of the timid to be of the fullest weight, the problem remains whether they outweigh the public necessities in this matter. That the protection of private rights upon occasion involves an invasion of those rights is in theory a paradox, but, in the world as it happens to be, is a realistic problem requiring a practical answer. That invasion should never occur except upon necessity, but unless democratic government (by which we mean government premised upon individual human rights) can protect itself by means commensurate with danger, it is doomed. That it cannot do so is the hope of its opponents, the query of its skeptics, the fear of its supporters. . . ."

Appellee submits that the trial court was correct in its view that there was ample proof of facts to support the Court's finding on the question of law that the questions were pertinent. Testimony and the record support

the proof of pertinency. The arguments as to the indictment appear applicable here—proof of the questions and question under inquiry supports finding them pertinent in fact.

In addition, the testimony explains their pertinence (R. 46, 50-60).

The objection that the Committee already knew the answer to the questions would, if true, be no defense. *Young v. U. S.*, DC Cir. 1954, 212 F. 2d 236 at 239, cert. den. 347 U.S. 1015, 1954.

IV. The Indictment and Proof Was Sufficient with Regard to the Element of "Wilfulness."

A. *It Is Not Necessary to Specifically Allege Wilfulness in the Charge.*

In *U. S. v. Deutch, supra,* the Court was specifically concerned with an indictment challenged for failure to allege "wilful" refusal. The holding of the Court is succinct and clear:

> "The statute uses the word 'willfully' as a word of art to define the offense of failing to appear, but it does not use the word 'willfully' with respect to a person 'who, having appeared, refuses to answer * * *.' The act of refusing (as distinguished from failing) to answer is a positive, affirmative act; the result is conscious and intended. Congress recognized that a failure to appear in response to a summons could well be due to other causes than willfulness or a deliberate purpose to disobey the summons or the statute; a witness might be confused as to the time or place of the hearing, or inadvertently overlook it or become ill. To decline or refuse to answer a question, however, is by its very nature a deliberate and willful act."

The *Deutch* case, *supra,* which reversed the trial court's dismissal of the indictment, also appropriately distinguishes the case of *Quinn v. U. S.,* 349 U.S. 155, 1955, which was concerned not with the indictment but with proof of deliberate, intentional refusal to answer. Attention is invited to the following topic of this brief discussing proof of wilfulness, and in particular to *Sinclair v. U. S., supra,* which, as the *Deutch* case, pointed out that wilfulness was not part of the charge in the second portion of 2 USC 192. See, also, *Fields v. U. S., supra,* and *Dennis v. U. S.,* DC Cir. 1948, 171 F. 2d 986, aff. 339 U.S. 162, 1950, which reason that wilful does not mean bad purpose or intent to break the law, but only doing an act knowingly and deliberately. If refusal is by nature a deliberate and wilful act, the indictment would not be changed in meaning by the addition of the word "wilfully." See, also, *U. S. v. Josephson, supra.*

B. *The Proof Established that the Appellant's Refusals Were Deliberate, Intentional and Wilful.*

The question of wilful refusal was submitted to the jury under proper instructions. The jury resolved this fact question against the appellant. There is evidence to support its verdict. The verdict should not be disturbed.

The appellant advised the Committee that he had "no intention of becoming a member of your stable of stool pigeons."

The appellant was specifically directed to answer the questions, and could have been under no illusion that the questions for which he was indicted were aban-

doned, nor his claim of privilege accepted as to them. The defense submitted no evidence to the jury to counter this proof.

Good faith and advice of counsel are not defenses to wilful refusal to answer the questions in any event. *U. S. v. Costello,* 2 Cir. 1952, 198 F. 2d 200, cert. den. 344 U.S. 874, rehearing den., 344 U.S. 900, 1952. Therein the court held that the trial court properly instructed the jury:

> "A belief on the part of the defendant that he lawfully could act as he did or the fact that he might have been advised by his attorney that he lawfully could act as he did, is no justification for his acts and may not be considered by you in determining whether the defendant acted in good faith."

See also *Eisler v. U. S.,* DC Cir. 1948, 170 F. 2d 273, cert. den. 338 U.S. 883, 1949, in which the court held that good faith and mistake of law are not a defense, and that the offense may be made out if the refusal to answer is deliberate and intentional.

The appellant's reliance on *U. S. v. Murdock,* 290 U.S. 389, 1933, is surprising considering the analysis in that case of *Sinclair v. U. S., supra,* and in its analysis said:

> "The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer . . ."

Appellee submits that the record refutes good faith of appellant if such were a basis for defense, but, instead, shows hostility toward the Committee translated into conduct consciously intended to frustrate it.

That the privilege against self-incrimination, as stated in *Hoffman v. U. S.*, 341 U.S. 479, 1951, must be accorded liberal construction in favor of the right it was intended to secure, provides no basis for contending that a good faith assertion of the privilege is a defense, if in fact the privilege was not properly claimed.

While the government was in a criminal case bound to prove the charges beyond a reasonable doubt, the burden of going forward with the evidence may shift. See *U. S. v. Fleischman,* 339 U.S. 349, 360, 1950.

We invite the court's attention to further discussion of wilfulness under the section of appellee's brief regarding direction to answer.

V. The Trial Court Properly Ruled That the Appellant Was Not Entitled to Invoke the Privilege Against Self-Incrimination.

A. *The "Setting" and Circumstances Did Not on the Record Support a Reasonable Fear of Self-Incrimination.*

It is urged that because some law enforcement officers were in attendance, the setting was one to justify fear of incrimination. The presence of law enforcement officers to assist in the keeping of order at a public hearing hardly amounts to a star chamber. The trial court had no record of testimony of others placed before it upon which to support the position that to answer the questions might be injurious. The appellant approached the question of the testimony of one Cannon and one Owen (R. 69), but did not ask the witness under cross-examination to repeat the testimony of these witnesses, show whether it was elicited in the presence of the ap-

pellant, or had come to appellant's knowledge. It is submitted that the appellant chose to conceal from the trial court a portion of the defense he now claims, and, having lost, seeks now to avail himself of the matter in the appellate court having none of the machinery of the jury, witnesses or other facilities which peculiarly equip the trial court to resolve the facts. The appellant was entitled to a fair trial, but only one. It was his responsibility to place his full known defense before the trial court.

Appellant, in his brief, asserts that he had good faith reasons to believe there was evidence tending to show Communist efforts to "infiltrate" educational institutions, trade unions, the maritime industry, and, in addition, makes numerous assertions outside the trial record. Appellant in no way connects himself on the record with any incriminating circumstances derived from Communist efforts to infiltrate educational institutions, trade unions, the maritime industry, and did not show any basis of fear of incrimination therefrom peculiar to himself, particularly as to the questions the subject of this conviction.

B. *Answers to the Questions Asked Could Not on the Record Have Incriminated Appellant.*

1. It is newly asserted on appeal that by stating his address, appellant might have identified his home as a place of Communist activity. Appellee submits that the trial court was entitled to have this assertion made before it and to evaluate the reasonableness of the claim. In *Starkovich v. U. S.*, 9 Cir. 1956, 231 F. 2d 411, the

trial record included indication that two persons of that name were known, and one who had been stated to live at certain places had been alleged by a previous witness to have been a Communist. Identity by address thus could, on the record before the trial court, be said to be a link in the chain of incriminating evidence in that case.

2. The question as to employment, considered on the record, the appellee submits, if properly placed before the trial court, would have been potentially vulnerable in view of the ambiguous circumstance occasioned by the leading questions of the Committee concerning activities as a Communist organizer and espionage, which could, by strained construction, be employment. However, the record (R. 67) clearly showed that the "present employment" concerned was that of a longshoreman and that the defense contention and theory of defense was that the Committee had the knowledge from other sources and was not entitled, therefore, for some obscure reason, to seek it from the witness. On this state of the record, the Court had a right to rule that the claim of privilege was improper and the jury to find the refusal to answer wilful. It is to be noted that the case of *Jackins v. U. S.*, 9 Cir. 1956, 231 F. 2d 405, involved a question covering the entire employment history of Jackins from 1935 to 1954 in a setting which the record showed gave Jackins reason to believe that he had been identified as a "youth leader" and "full time functionary" within the Communist Party, a clearly distinguishable setting.

3. On the record, no showing was made to support the claim of privilege as to the educational background questions about attendance at elementary school, high school or college. The questions were on their face and on the record innocuous. They were not "skillfully drawn questions designed to entrap." That Communist infiltration involves young people referred to in the Attorney General's list of subversives, is alone no reasonable support for the claim of privilege.

To accord the case of *Trock v. U. S.*, 351 U.S. 976, 1956, the meaning urged for it by appellant would do just that which the case of *Hoffman v. U. S., supra,* at p. 486, upon which the Supreme Court in the *Trock* case relies, forbids. In the *Hoffman* case the court said:

> "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified."

We submit that here the Supreme Court, on the record in the *Trock* case, only considered that the entire setting in the Grand Jury and the chain of questions asked taken together justified the claim of privilege—not that no showing was required. To hold otherwise would call for a modification of the *Hoffman* case, the citation of which was deemed a substitute for explanation of the reversal.

Reverence for the Fifth Amendment privilege against self-incrimination does not require tolerance of its abuse.

When questions do not on their face appear to call for an answer which would tend to incriminate, it is in-

cumbent upon the witness to justify his refusal to answer on the ground claimed, by making it appear that his assertion that the answer would tend to incriminate was based upon substantial reasons so to believe, and it is not enough that answers to anticipated later questions might incriminate. *Camarota v. U. S.*, 3 Cir. 1940, 111 F. 2d 243, 245; *U. S. v. Fleischman, supra.*

VI. Appellant Was Properly Directed to Answer the Questions Referred to in Each Count of the Indictment.

The Committee did lay the necessary foundation for a finding of criminal intent to violate Section 192 for a refusal to answer, as required by the Supreme Court in *Quinn v. U. S.*, 349 U.S. 155, 1955; *Emspak v. U. S.*, 349 U.S. 190, 1955, and *Bart v. U. S.* 349 U.S. 219, 1955. The appellant was apprised that the Committee demanded his answers notwithstanding his expressed reasons for refusing to answer. A clear-cut choice was afforded appellant between answering the questions and risking prosecution for failure to do so.

In accordance with the long-standing practice of Congressional Committees, approved by the Supreme Court in the *Quinn* case, *supra,* the Committee notified appellant of the overruling of his objections by specifically directing him to answer each question. As we will presently detail, the directions to answer were given *after* the claim of privilege was asserted with respect to each question.

In none of the three cases decided by the Supreme Court was the witness specifically directed to answer the question. Nor in *Jackins v. U. S.*, 9 Cir. 1956, 231

F. 2d 405, was there any specific direction to answer given with respect to the three questions upon which acquittal was directed on this ground.

In *Fagerhaugh v. U. S.*, 9 Cir. 1956, 232 F. 2d 803, the only specific direction to answer followed the witness' statement that he refused to answer for reasons other than the claim of privilege against self-incrimination. Thereafter, the witness, for the first time, raised his objection on the grounds of the Fifth Amendment. Following this claim of privilege, the Committee failed to direct the witness to answer, but, on the contrary, abandoned the question by the language: "There is no question before the witness." Unlike the *Fagerhaugh* case, the directions to answer in the present case were given after the claim of privilege and at no time did the Committee abandon the question.

1. The entire testimony of appellant before the Committee is set forth in Government's Exhibit No. 4. As to the first question, the appellant stated a number of grounds for refusing to answer (Govt's Exh. 4). Among these, appellant specifically stated:

> "I refuse to answer that question on the grounds of the FIFTH AMENDMENT, the decision of the United States judge, James Alger Fee, in the case of the United States versus . . ." (Govt's Exh. 4) (Emphasis supplied).

Thereafter, the appellant was not only specifically directed to answer the question but was also warned of a possible contempt on his part (R. 33). Following the direction to answer, the appellant simply reiterated the same grounds for his objection which had already been

overruled by the Committee. The appellant had been clearly apprised of the Committee's view upon his objection by the direction to answer.

This situation is, therefore, distinguished from *Fagerhaugh v. U. S., supra,* in which case the direction to answer came *before* the claim of privilege against self-incrimination. In the present case, the direction to answer came *after* the same claim of privilege.

2. With respect to the second question, the appellant stated his objection as follows:

> "Mr. Kunzig, I refuse to answer it not just on the fifth amendment, as you stated that you would understand my refusals would be based upon, *but upon all of the grounds that I have previously stated.*" (Govt's Exh. 4) (Emphasis supplied).

Thereafter, the Chairman directed appellant to answer the question (R. 54). By the direction to answer, the appellant was clearly apprised that the Committee had overruled his grounds for refusal to answer, not only on the basis of the Fifth Amendment, but also upon the grounds he had previously stated, which included the First, Fifth, Ninth and Fourteenth Amendments to the U. S. Constitution and the similar provisions of the Constitution of the State of Oregon. The appellant thereafter simply repeated the reasons for his refusal to answer, all of which had been clearly ruled upon by the Committee. By going on to the next question, after having directed appellant to answer, the Committee certainly did not abandon this question, but merely put an end to appellant's repetitious statement of his ground for refusal.

3. Following the appellant's refusal to answer the third question, appellant commenced a repetition of the reasons he had previously stated for his refusal to answer, whereupon the Committee Chairman directed appellant to answer the question. The appellant's deliberate, intentional refusal to answer the question is further shown by his statement that he had "no intention of becoming a member of your stable of stool pigeons." The Committee did not abandon this question, but, on the contrary, directed appellant to answer the question, and moved along to the next question when appellant persisted in his refusal.

Appellant contends that the direction to answer was given to a question different from the one originally put to him. It is submitted that the direction to answer need not be *in haec verba*. The record amply supports that the appellant was directed to answer the same question originally asked.

4. In response to the fourth question, appellant refused to answer, stating that he was standing on the Constitution of the United States and "the same provisions that I cited earlier." Thereafter, appellant was specifically directed to answer the question.

5. Appellant concedes that the Committee clearly indicated its overruling of his reason to answer the fifth question by specifically directing the appellant to answer.

The record of this case clearly demonstrates that as to each of the five questions comprising the five counts of the indictment, the Committee unequivocally indi-

cated to the appellant that it had overruled his objections to the question by specifically directing the appellant to answer each question. By directing the appellant to answer, the appellant was adequately apprised that an answer was required notwithstanding his reasons for refusal.

Since appellant concedes that the fifth count must be upheld in this regard, it is respectfully submitted that the sustaining of appellant's conviction on any one count of the indictment requires affirmance of the judgment below, because the general sentence imposed on all counts was less than the maximum allowable on any single count. *Sinclair v. U. S.,* 279 U.S. 263, 299, 1929; *Lowden v. U. S.,* 9 Cir. 1951, 187 F. 2d 484.

In the *Quinn* case, *supra,* the Supreme Court pointed out that no fixed verbal formula was necessary to indicate to the witness the Committee's disposition of the reasons given by the witness for his refusal to answer. In the instant case, we observe, however, that the Committee followed the procedure suggested by the Supreme Court, by specifically directing the appellant to answer each question. In this way, the appellant was not forced to guess as to the Committee's ruling upon his grounds of objection. There is not any evidence whatever in the record to the effect that appellant was under any misapprehension as to the disposition by the Committee of appellant's objections. At the trial, appellant did not raise this point in any manner, introduce any evidence or make any claim whatever that he was, in fact, under any misapprehension as to the disposition of his objec-

tions by the Committee. In fact, the question of wilfulness and intent was submitted to the jury under proper instructions and resolved against appellant.

To adopt the position of the appellant would allow a recalcitrant witness to defeat a direction to answer by merely constantly repeating his grounds of objection after they have been overruled.

CONCLUSION

This case should be decided on the trial record. The trial court should be affirmed on his rulings in the absence of error. The jury's findings of fact in a criminal case, where there is evidence to support the finding, should not be disturbed. The trial court's rulings as to privilege and pertinence are supported on the record and the transcript as a whole demonstrates that the appellant was hostile and recalcitrant and by sham claims, frustrated the Subcommittee in its questioning of him as a witness. His theories of claim of privilege are afterthought, his technical objections to the indictment are groundless and his deliberate refusal to answer the questions justified the conviction. Appellant contends that as to 4 of the 5 counts on which he was convicted, he was not, within the rulings of the *Quinn, Bart* and *Emspak* cases, *supra,* sufficiently directed to answer and informed that his claims of privilege were denied. The reading of the transcript would leave no other impression than that the appellant was fully aware of the Committee's direction to answer and denial of privilege. Adoption of the appellant's theory on these facts could

lead only to a race of diligence between Committee and witness to speak the last words.

It is respectfully submitted that the appellant seriously abused the precious constitutional privileges he asserted. The verdict and judgment should be affirmed.

Respectfully submitted,

C. E. Luckey
United States Attorney
District of Oregon

Robert R. Carney
Assistant U. S. Attorney

Attorneys for Appellee

November, 1956